*** HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE**
AND
HON'BLE SHRI JUSTICE C.V.NAGARJUNA REDDY

+WRIT PETITION No. 958 of 2007

% Dated 09-07-2007

 # John Sushil Kale

… Petitioner

VERSUS

$ The Family Court Judge, Family Court,
Secunderabad and another.

Respondents

! Counsel for Petitioner : Party-in-person

^Counsel for Respondent No.2 : Ms. J. Geethanjali

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? Cases referred

1. AIR 1961 SC 1808
2. AIR 1954 SC 300

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HON'BLE SHRI G.S.SINGHVI, THE CHIEF JUSTICE

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HON'BLE SHRI JUSTICE C.V.NAGARJUNA REDDY

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WRIT PETITION No.958 of 2007

Between:

John Sushil Kale

… Petitioner

AND

The Family Court Judge, Family Court,
Secunderabad and another.

… Respondents

: O R D E R :

Counsel for the petitioner : Party-in-person

Counsel for respondent No.2 : Ms. J. Geethanjali

Dated: 9th July, 2007

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Per C.V.NAGARJUNA REDDY, J.

This writ petition is filed for a writ of Certiorari to quash the admission of O.P.No.325 of 2006, on the file of the Family Court, Secunderabad (respondent No.1), as the same is violative of Article 20 (3) of the Constitution of India and Section 315 (1) of the Code of Criminal Procedure.

A few facts, which are necessary for the disposal of this writ petition, may be summarized as under:

Respondent No.2 is the legally wedded wife of the petitioner. The petitioner's marriage with respondent No.2 was solemnized on 22.12.2003. About two years after their marriage, differences crept in between them and according to the petitioner's version, as reflected in the affidavit, he was even assaulted by one of the three brothers of respondent No.2. On 11.01.2006, they trespassed into his house and had taken away respondent No.2 along with them. On the petitioner complaining about the said incident, a case was registered by the Alwal police for the offences under Sections 448, 452 and 506 of the Indian Penal Code (for short 'IPC'). On 12.01.2006, respondent No.2 also gave a complaint to the Alwal Police Station against the petitioner and

his mother for causing mental and physical harassment for getting additional dowry, which was registered as Crime No.49 of 2006 under Section 498-A IPC. The said criminal case was taken on file by the VI Metropolitan Magistrate, Medchal, Cyberabad as C.C.No.859 of 2006 and the same is pending trial.

Meanwhile, respondent No.2 filed petition under Section 32 of the Indian Divorce Act, 1869 (for short 'the Divorce Act') registered as O.P.No.325 of 2006 before the Family Judge, Secunderabad for restitution of conjugal rights.

The petitioner, without entering into his defence by filing written statement in the said divorce petition, filed three I.As, namely, I.A.Nos.895, 896 and 897 of 2006 purportedly under Section 9 of the Divorce Act. I.A.No.895 was filed to dismiss O.P.No.325 of 2006 in limine with costs or alternately to refer the questions regarding the jurisdiction of the Family Court to decide O.P.No.325 of 2006 pending C.C.No.859 of 2006 on the file of VI Metropolitan Magistrate, Medchal, Cyberabad. I.A.No.896 of 2006 was also filed for a similar relief and I.A.No.897 of 2006 was filed to refer the questions regarding the jurisdiction of the Family Court to decide O.P.No.325 of 2006 to this Court for a decision.

The petitioner filed the present writ petition on the ground that the Family Court, Secunderabad is proceeding with O.P.No.325 of 2006 without deciding the I.As filed by him and to quash the proceedings in the said O.P. In response to the notice issued by this Court, respondent No.2 filed a counter-affidavit.

We have heard Sri John Sushil Kale appearing-in-person and Ms. J. Geethanjali, learned counsel for respondent No.2.

The petitioner raised the following contentions:

1. As the criminal case registered at the instance of respondent No.2 is pending before the VI Metropolitan Magistrate, Medchal, Cyberabad, in which the petitioner is one of the accused, the Family Court, Secuderabad cannot proceed with the petition filed by respondent No.2 for restitution of conjugal rights, as the petitioner cannot be compelled to disclose his defence, which would be violative of Article 20 (3) of the Constitution of India;
2. The petition for restitution of conjugal rights itself was not maintainable, since the two ingredients of one of the spouses leaving the company of the other "without reasonable excuse" and the absence of legal ground to resist the application for restitution of conjugal rights which are *sine qua non* for entertaining a petition for restitution of conjugal rights and granting a decree therefor, are completely absent in this case, as the filing of the criminal case under Section 498-A IPC itself constitutes reasonable excuse to leave the company of his spouse and a legal ground not to allow the application for restitution of conjugal rights;
3. In view of Section 9 of the Divorce Act, it is incumbent upon the Family Court to refer the issues raised by the petitioner to the High Court; and

4. As respondent No.2 has already filed a criminal case under Section 498-A IPC, she cannot pursue both the remedies, which are mutually inconsistent with each other and that she is bound to pursue one of the two remedies under the Doctrine of Election.

Ms. J. Geethanjali, learned counsel appearing for respondent No.2 in her short, but crisp submissions contended that Article 20 (3) on which reliance is placed by the petitioner has no application to the facts of this case since the petitioner is not compelled to disclose his defence in the criminal case, the scope of which is totally different. She further submitted that the contention No. 2 raised by the petitioner is touching the merits of O.P.No.325 of 2006 filed for restitution of conjugal rights and, therefore, this ground is not available to the petitioner in the present writ petition.

In reply to contention No.3 raised by the petitioner, she submitted that under Section 9 of the Divorce Act, the Court, before which the proceedings are pending is required to be satisfied that a question of law or usage having the force of law arises in the case and that it is for the Family Court to decide whether any such question of law or usage having the force of law had arisen and that the petitioner cannot compel the Court to refer the issues to the High Court in the absence of the Court reaching its satisfaction as to the existence of the question of law or usage having the force of law in the proceedings pending before it.

Lastly, the learned counsel submitted that Doctrine of Election as pressed into service by the petitioner has no application at all to the instant case since respondent No.2 is entitled in law to pursue both the proceedings.

We have carefully considered the respective submissions.

In support of the contentions of the petitioner, though he filed a number of judgments, he mainly relied upon the judgment of the Supreme Court in **State of Bombay v. Kathi Kalu Oghad**[1] and **M.P. Sharma and others v. Satish Chandra, District Magistrate and others**[2].

We have gone through the said two judgments and are satisfied that they have no application at all to the present case. In fact, the case of **State of Bombay v. Kathi Kalu Oghad (1 supra)** was referred to a eleven Judge Bench of the Supreme Court to re-examine some of the propositions of law laid down by the Supreme Court in **M.P. Sharma and others v. Satish Chandra, District Magistrate and others (2 supra)**. In all the cases, which arose before the eleven Judge Constitution Bench, the question arose whether the accused could be forced to subscribe their signature or finger prints or hand writing for the purpose of comparison and that whether such an act violates Article 20 (3) of the Constitution of India.

In the present case, the petitioner is not compelled to be a witness in the pending criminal case against him. His having to

enter the defence in the proceedings initiated by respondent No.2 under Section 32 of the Divorce Act, which is purely civil in nature, by no means attracts Article 20 (3) of the Constitution. Since the criminal case and the proceedings under Section 32 of the Divorce Act are totally independent and their scope and nature are entirely different from each other, we are of the considered view that the petitioner's reliance on Article 20 (3) is wholly misplaced.

With regard to contention No. 2, whether filing of criminal case under Section 498-A IPC by respondent No.2 against the petitioner and its pendency constitutes reasonable excuse and offer legal ground for the petitioner to resist the relief of restitution of conjugal rights claimed by respondent No.2 or not as rightly pointed out by the learned counsel for respondent No.2, are issues which touch upon the merits of the case and it is for the Family Court to decide the same in the main O.P.

As regards the contention relating to reference of the issues raised by the petitioner to the High Court, Section 9 of the Divorce Act reads as under:

> "When any question of law or usage having the force of law arises at any point in the proceedings previous to the hearing of any suit under this Act by a District Court or at any subsequent stage of such suit, or in the execution of the decree therein or order thereon,
>
> the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the case and refer it, with the Court's own opinion thereon, to the decision of the High Court.
>
> If the question has arisen previous to or in the hearing, the District Court may either stay such proceedings, or proceed in

the case pending such reference, and pass a decree contingent upon the opinion of the High Court upon it.

If a decree or order has been made, its execution shall be stayed until the receipt of the order of the High Court upon such reference."

Merely because the petitioner filed certain I.As by raising the contention that he raised the questions of law or usage having the force of law, the Family Court is not bound to refer the matter to the High Court. The expression "*when any question of law or usage having the force of law arises*" used in Section 9 of the Divorce Act pre-supposes that the Court before which the proceedings are initiated or instituted is required to be satisfied that such a question of law or usage having the force of law had arisen. The petitioner has so far not filed his written statement.

In our opinion, the party cannot invoke Section 9 as a matter of course to compel the Court of competent jurisdiction, which is seized of the proceedings instituted under the provisions of the Divorce Act to refer the matters to High Court. It is only when the parties through proper pleadings raise such questions and satisfy the Court that such questions do in fact arise that the Court of competent jurisdiction is required to refer such questions to the High Court and not until then. In any event, the so called questions of law, which were raised in the three I.As are raised in the writ petition and they are already referred to and dealt with by us hereinabove. We are convinced that none of the questions raised by the petitioner constitute such questions of law, which are required to be referred by the Family Court for being decided by

this Court.

The last contention of the petitioner that the respondent is barred from pursuing both the remedies, namely; the remedy under Section 32 of the Divorce Act and the one under Section 498-A IPC on the principle of Doctrine of Election is untenable. By the very nature, the two proceedings are altogether different in scope and purport. While the proceedings under Section 498-A involve the issue whether the petitioner is guilty of the offence which he is charged with, the petition filed by respondent No.2 under Section 32 concerns her right for restitution of conjugal rights, which is purely civil in nature.

Whether in the face of the criminal proceedings initiated by respondent No.2 the petitioner is entitled to the relief under Section 32 or not is a matter which is required to be adjudicated on merits by the Family Court in the main O.P., but there is no provision under the Divorce Act or for that matter under any other Act which bars respondent No.2 to pursue the remedy under Section 32 when a criminal proceedings initiated at her instance against the petitioner is pending. Therefore, the question of respondent No.2 being compelled to pursue one of the two remedies does not arise.

For the aforementioned reasons, the writ petition is wholly misconceived and is therefore dismissed.

As a sequel to dismissal of the writ petition, WPMP.No.1184 of 2007 filed by the petitioner for interim relief is also dismissed.

C.V. NAGARJUNA REDDY, J

G.S.SINGHVI, CJ

Date: 09-09-2007.

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[1] AIR 1961 SC 1808

[2] AIR 1954 SC 300